IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1054

SEALY, INCORPORATED, SEALY SPRING CORPORATION—INDIANA, SEALY SPRING CORPORATION—EAST, SEALY SPRING CORPORATION—WEST, SEALY MATTRESS COMPANY OF COLORADO, INC., SEALY MATTRESS COMPANY OF NORTHERN CALIFORNIA, INC., SEALY MATTRESS COMPANY OF SOUTHERN CALIFORNIA, INC., SCHNORR MANUFACTURING COMPANY, INC., SEALY MATTRESS COMPANY OF FLORIDA, INC., SEALY MATTRESS COMPANY OF PITTSBURGH, INC., SEALY MATTRESS COMPANY OF PHILADELPHIA, INC.,

Petitioners,

vs.

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, SEALY MATTRESS COMPANY OF HOUSTON, SEALY MATTRESS COMPANY OF PUERTO RICO, INC., SEALY OF THE NORTHEAST, INC., AND SEALY MATTRESS COMPANY OF GEORGIA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO BRIEF IN OPPOSITION.

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The Brief in Opposition offers four reasons why certiorari should be denied (Br. Opp. i). The first and fourth of these,

however, are irrelevant to the grant or denial of certiorari. We respond to them first.

I.

POINT 1. In arguing that petitioners "consciously defied" the decision in *United States* v. *Sealy*, respondents merely repeat their own unfounded accusations, reiterated throughout the trial and in arguments to the jury and to the court of appeals. The opinion of the court of appeals lends no support to the charge. The jury was given no instruction pertinent to such an accusation and its general verdict cannot conceivably be taken as representing a finding that the accusation was true.

Since the entry of the final decree in *United States* v. *Sealy*, the Department of Justice has conducted two compliance investigations (both at the instigation of respondent, after the filing of the present lawsuit) and has made no charges of noncompliance. After the jury verdict in this case, respondent petitioned the decree court for action against petitioner under the decree. Respondent's petition (for "construction or modification" and "enforcement" of the decree) was opposed by the Department of Justice and was summarily dismissed by the trial court. The court of appeals affirmed.[1] Sealy's actions following the decision of *United States* v. *Sealy*, taken both to comply with the decision and to minimize the severity of its impact, were taken openly, under the scrutiny of the Government lawyers and the district court charged with carrying out the mandate of this Court, and in pursuance of an agreed decree. No one but respondent has ever suggested that these actions constituted "conscious defiance" or "calculated noncompliance" or conduct that was in any respect contumacious.

POINT 4. In arguing that the decision below can be supported under the Rule of Reason, respondents simply ignore this Court's decision in *Sunkist Growers, Inc.* v. *Winckler & Smith*

1. *United States* v. *Sealy, Inc.*, No. 76-2128 (7th Cir. October 11, 1978) (unreported).

Citrus Products Co., 370 U. S. 19, 29-30 (1962), cited in the Petition, p. 7, n.7. In that case (like this one, a private treble damage action under the antitrust laws) the unanimous opinion stated:

> Since we hold erroneous one theory of liability upon which the general verdict may have rested . . . it is unnecessary for us to explore the legality of the other theories. As was stated of a general verdict in Maryland use of Markley v. Baldwin, 112 U.S. 490, 493 (1884), "[I]ts generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld . . ."[2]

The question presented by the petition for certiorari is whether the per se rule or the Rule of Reason should govern this case, not whether there is enough evidence in the record to support a finding of liability—never made—under the Rule of Reason.[3] The court of appeals upheld the judgment on the basis that the per se rule governed, and the question whether that ruling was correct is necessarily presented by this case. We do not understand respondents to contend otherwise.

2. The *Sunkist* principle has exceptional force in this case, because the jury was expressly instructed that if it found a per se offense it *could not consider* the Rule of Reason. 2 App. 1252.

3. Accordingly, it is irrelevant to consider respondents' arguments as to evidence bearing on the reasonableness of Sealy's arrangements. We must note, however, a serious inaccuracy in respondents' attempt (Br. Opp. 4-5) to blow up Sealy's modest share of the market into large local market shares (a contention not reflected in any instruction and one which is especially curious, since if the markets are truly local a division of markets among Sealy licensees could have no significant horizontal effect). Contrary to the statement in the brief (Br. Opp. 5, n. 6), the cited testimony was that in 15 "areas" the *eight*—not four—largest firms held 76% of the market. Unmentioned is the fact that the very exhibit relied on—plaintiff's own compilation—showed that the weighted average Sealy share in *all* of the areas was only 14.2%, and that in only *one* area did the share exceed 25%. PTX 417, 1 App. 414. The highly unconcentrated nature of the mattress industry is demonstrated by Census data. See Pet. 3, n. 2.

Equally irrelevant is the fact that petitioner accepted the per se instruction in the trial court and did not challenge its basis until after the judgment in that court. Neither petitioner nor the district court had any reason for questioning the decision in *United States* v. *Sealy* until this Court's decision in the *Sylvania* case. The jury verdict was returned on April 1, 1975, and the final judgment of the trial court was entered on January 18, 1977. *Sylvania* was not decided until June 23, 1977, nearly six months after notice of appeal to the court of appeals was filed in this case. The court of appeals correctly held that petitioner was entitled to the benefit of any change in the law pending appeal, and addressed on the merits the question of the effect of *Sylvania* on the decision in *United States* v. *Sealy*. The fact that the instruction was agreed to was properly disregarded by the court below.

II.

The substance of the Brief in Opposition is thus confined to pages 6-10 thereof, where respondents contend that Sylvania is not inconsistent with *United States* v. *Sealy* and that a decision in the pending *ASCAP* case could not possibly require reversal of the decision below. Both positions are so clearly untenable that they merely highlight the importance of granting certiorari in this case.

POINT 2. With regard to *Sylvania*, respondents' argument is that this Court in *Sylvania* embraced an absolute distinction between horizontal and vertical restrictions and decided that balancing gains in interbrand competition against losses in intraband competition is never appropriate in a horizontal case —horizontal restrictions are always illegal per se (Br. Opp. 8 and n. 7).

The rationale of *Sylvania* will not support that view. If interbrand competition may sometimes outweigh intrabrand, thus necessitating a Rule of Reason approach when these interests are in conflict, this is as true in a case involving a horizontal restriction as in one involving a vertical restriction. Joint ventures are an example of a horizontal restraint that has never been regarded as illegal per se. The reason is that a joint venture, while it ordinarily eliminates competition among the venturers in the market in which the venture operates, may increase competition with other firms in the market, and on balance the vigor of competition may be increased. In this case the Sealy group restricted intrabrand competition in order to compete more effectively with other mattress manufacturers. To suppress such an arrangement per se solely because it is horizontal rather than vertical—when most horizontal arrangements, like most vertical arrangements, are tested under Rule of Reason rather than per se principles—is the height of formalism. It is completely inconsistent with the emphasis on economic considerations, and the specific concern with free-rider problems, which animates the *Sylvania* opinion.

Likewise, it is no less true of a trademark owner than of a manufacturer that it has "an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of [its] products" (433 U. S. at 56; Br. Opp. 7). Indeed, this very case demonstrates the parallel: This case is in fact a "vertical" controversy between a licensee, having only a negligible interest in the value of the trademark, and its licensor, the owner of the trademark, who, like a manufacturer, seeks to promote the efficient distribution of the trademarked product.[4]

Nor is the principle of *Sylvania* limited to very small firms (Br. Opp. 7). As this Court recognized in *Sylvania*, the "redeeming virtues" which call for Rule of Reason rather than per se analysis include considerations applicable to "all businesses, regardless of their size, financial health, or market share." 433 U. S. at 53 n. 22.

4. We do not, of course, contend that a group of competing firms can take themselves out of the per se rule against market division simply by adopting a common trademark. The *Timken* case (see

(Footnote continued on next page.)

Point 3. Respondents' discussion of the pending *ASCAP* case shows how untenable is their effort to defend the horizontal-vertical distinction for purposes of choosing between Rule of Reason and per se analysis. *ASCAP* is, of course, a horizontal case. It, and this case, involve *not* the question of "wholesale abrogation of the per se doctrine so as to permit the attempted justification of naked restraints" (Br. Opp. 10) but whether the ancillary-restraint doctrine of the *Addyston Pipe* case (Br. Opp. 10) should be applied to horizontal arrangements that are *not* "naked" restraints. In the case of *ASCAP* the question is whether the Rule of Reason should apply to price-fixing through a joint agency, of competing copyrights (interbrand competition) with aggregate market power approaching monopoly. In the instant case the question is whether the Rule of Reason should apply to intrabrand, not interbrand, territorial restrictions affecting a single trademark with only a fraction of the market.[5] The only basis for distinction suggested by respondents—that the ASCAP arrangements enable users to "receive a product distinct from what individual copyrights owners offer" (Br. Opp. 9)—is not a distinction. The Sealy licensees could not individually market a national brand. That brand, an important product in the mattress market, is the "fundamentally different product" that the Sealy licensing arrangements make possible. As for the lower "transaction costs" made possible by the ASCAP arrangement (Br. Opp. 9), such costs are no different

(Footnote continued from preceding page.)

Br. Opp. 8 n. 7) was a classic instance of a world-wide conspiracy to divide markets, in which a common trademark was adopted as a spurious facade, as both the trial court and this Court readily perceived. (*Cf. Sylvania,* 433 U. S. at 58, n. 28.) There is no suggestion that the Sealy licensees share the Sealy mark for the purpose of disguising an illegal division of the mattress market, and their small share of the market would make any such effort quixotic. The historic purpose of the Sealy joint venture, successfully pursued, was to *extend* the market for the manufacturers' products, not to divide the market. See Findings of Fact, *United States* v. *Sealy, Inc.*, 1964 Trade Cases ¶ 71,258 (N. D. Ill. 1964), Findings 84-109.

5. See *supra,* n. 3.

than the lower costs of providing advertising and other services made possible by the Sealy system, a form of firm resting on contract integration rather than corporate integration.

Whatever distinctions there are between *ASCAP* and this case for purposes of applying the Rule of Reason clearly favor Sealy's case, not ASCAP's. Thus even a ruling unfavorable to ASCAP would not dispose of the issues tendered by the petition in this case. Obviously, however, a decision rejecting per se treatment of ASCAP would have profound implications for the proper treatment of the arrangements at issue in this case, and for the continued vitality of *United States* v. *Sealy.*

Respondents' inability to articulate a reasoned distinction between this case, on the one hand, and either *Sylvania* or *ASCAP*, on the other, confirms that the writ of certiorari should be granted.

Respectfully submitted,

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